Supreme Court, U. S.
FILED
AUG 14 1980
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-41

PEOPLE OF THE STATE OF ILLINOIS,
Et Al. - - - - - - - - - Petitioners,

versus

INTERSTATE COMMERCE COMMISSION,
Et Al. - - - - - - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

FRED R. BIRKHOLZ
P. O. Box 32290
Louisville, Kentucky 40232
Tel. (502) 587-5454

EMRIED D. COLE
500 Water Street
Jacksonville, Florida 32202
Tel. (904) 359-1244

R. LYLE KEY, JR.
P. O. Box 32290
Louisville, Kentucky 40232
Tel. (502) 587-5739

Counsel for Respondent Louisville and Nashville Railroad Company

August, 1980

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

CONTENTS

PAGE

Question Presented 1

Statement of the Case 2

Reasons Why the Writ Should be Denied 4

1. The "Question Presented" Was Not Adequately Raised Before the Court of Appeals 4
2. The Question Presented Is Not an Important and Recurring Legal Problem Which Merits This Court's Review 5
3. The ICC Did Not Defer its Environmental Responsibilities to Other Agencies; It Merely Rejected Inappropriate "Environmental" Conditions Suggested by One of its ALJ's 6

CITATIONS

Cases:

	PAGE
Adickes v. *Kress & Co.*, 398 U. S. 144, 147 n.2 (1970)	4
American Trucking Associations, Inc. v. *United States*, 242 F. Supp. 597, 599 (D.C.D.C. 1965), *aff'd per curiam*, 382 U. S. 373 (1966)	8
NLRB v. *Sears, Roebuck & Co.*, 421 U. S. 132, 163-64 (1975)	4
Ramsey v. *Mine Workers*, 401 U. S. 302, 312 (1971)	4

Statutes:

49 U.S.C. § 11343	5

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-41

PEOPLE OF THE STATE OF ILLINOIS,
ET AL. - - - - - - - - *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION,
ET AL. - - - - - - - - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Louisville and Nashville Railroad Company ("L&N"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this proceeding.

QUESTION PRESENTED

In a proceeding in which the Interstate Commerce Commission found that the benefits of a proposed transaction, both environmental and operational, outweighed certain harmful environmental impacts and

that environmental concerns and adverse conditions were essentially preexistent, did said Commission err in declining to condition its grant of authority to consummate said transaction upon certain so-called environmental conditions suggested by one of its Administrative Law Judges.

STATEMENT OF THE CASE

Respondent L&N accepts Petitioners' "Statement" with the following additions and corrections.

The Interstate Commerce Commission's ("ICC") Administrative Law Judge ("ALJ") made the following findings in addition to those quoted by Petitioners:

> "Here, environmental concerns and adverse conditions essentially are preexistent. They will not change in a 'significant' way by the addition of the trains and cars to be switched or moved through Yard Center under applicant's proposal. Also, the negative effect upon Dolton, South Holland, and Lansing are counterbalanced by a positive environmental effect upon the Hammond area and a slight benefit in relation to air quality and fuel consumption (because of traffic moving over a shorter route). Noise and traffic congestion related to rail traffic would increase, especially in the Yard Center area; however, the impact, in relation to existing conditions, would not be consequential on an overall basis. Also, grade crossing problems and attendant safety concerns would intensify, but only to a slight degree, while the adverse effects on some existing traffic problems actually might be improved with the proposed in-

stallation of new switching and control devices on the existing tracks." (Pet. App., p. 50a).

"On the other hand, this proceeding is not the proper forum for exploration of matters collateral to the noted controlling issues. . . . It is not the proper proceeding in which to establish or enforce Federal noise standards for rail yards. And, it is not the proper forum for the State of Illinois and local communities to mount collateral attacks on environmental matters based upon their apparent inability to prosecute or enforce local ordinances." (Pet. App., 52a).

Also, Respondent does not concur with Petitioners' statement that the ICC rejected the ALJ's proposed conditions because they related to areas subject to the regulation of other agencies, because other agencies were the appropriate authorities to enforce compliance, and because the cost of compliance was not shown in the record. (Pet., p. 7). These considerations may have had some bearing on the Commissioner's decision to reject its ALJ's suggested conditions, but the Commission also discussed the facts of the case that related to environmental concerns and concluded that said facts did not warrant imposition of the ALJ's suggested conditions. (Pet. App., pp. 16a-17a).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The "Question Presented" Was Not Adequately Raised Before the Court of Appeals

The petition should be summarily denied for the simple reason that the "Question Presented" framed by Petitioners was not among the four issues they raised before the United States Court of Appeals for the Seventh Circuit. (Pet. App., pp. 3a-6a). The question Petitioners have submitted to this Court was set forth only as argument, on page 24 of their brief to the Seventh Circuit, in support of Petitioners' contention that the Commission failed to present adequate findings in its Certificate and Decision to support its reversal of the ALJ's initial decision. The issue raised in Petitioners' "Question Presented" was not covered in the Seventh Circuit's discussion of the aforementioned "reversal without adequate findings" issue. (Pet. App., pp. 4a-5a).

Thus, as a result of Petitioners' failure to adequately raise the issue embraced in their "Question Presented" before the Seventh Circuit, this Court will not have the benefit of a lower court opinion on said issue. It is well settled that:

> "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *accord, NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Ramsey* v. *Mine Workers*, 401 U.S. 302, 312 (1971).

Accordingly, this Court need give this matter no further consideration.

2. The Question Presented Is Not an Important and Recurring Legal Problem Which Merits This Court's Review.

There are additional reasons why the writ should be denied. Notwithstanding Petitioners' contention that the involved issue is of public importance, the question presented does not represent an important recurring legal problem which merits this Court's review. The Court is, in essence, being asked to consider whether or not the Commission erred in declining to condition a grant of authority upon certain conditions suggested by one of its ALJ's, and any decision with respect to that matter would be inextricably linked to the facts of this proceeding.

Petitioners also argue that this case would have precedential value with respect to future railroad unifications. (Pet., pp. 10-11).

Even though the involved trackage rights project is governed by 49 USC § 11343, the same statute that governs railroad mergers, it is difficult to visualize very much, if any, other connection between:

(1) A transaction in which one railroad seeks to effect a yard consolidation by acquiring trackage rights over a 5.6 mile stretch of another railroad[1] for contemplated use by two trains per day[2];

---

[1]Pet. App., p. 28a.

[2]Pet. App., pp. 38a-39a.

And

(2) A merger proceeding in which two or more railroads seek to unify their systems.

3. The ICC Did Not Defer Its Environmental Responsibilities to Other Agencies; It Merely Rejected Inappropriate "Environmental" Conditions Suggested by One of its ALJ's.

Notwithstanding their statement of the "Question Presented," Petitioners are in reality asking this Court to find that the ICC erred in declining to condition certain authority upon eight so-called environmental conditions suggested by one of its ALJ's. Petitioners suggest that in rejecting the ALJ's recommended conditions, the Commission disregarded its responsibilities under the National Environmental Policy Act ("NEPA") and in essence deferred to local, state, and other federal agencies for control of alleged environmental consequences. (Pet., pp. 11-13). Petitioners' argument is without merit since the Commission clearly has discretionary power to determine whether or not conditions suggested by one of its ALJ's are appropriate in the context of a given case. Such conditions are not prima facie reasonable or appropriate just because they are suggested by an ALJ, and NEPA does not require that the Commission impose such conditions when it finds them inappropriate.

Contrary to Petitioners' allegations that the Commission ignored its environmental responsibilities, the record clearly shows that the environmental impacts of the proposed transaction were exhaustively considered.

The Commission's Section of Energy and Environment prepared an Environmental Impact Statement with respect to this case[3], the ALJ devoted an entire section of his order to "Environmental Considerations,"[4] and the full Commission thoroughly considered the environmental aspects of the proposed transaction.[5] The Commission noted that:

> ". . . [T]he Federal Environmental Impact Statement (FEIS) concluded that the traffic problems at Thornton Junction would be mitigated by the installation of power switches and crossover tracks. L&N has stated that it plans to install crossover tracks north of the GTW connection and power controlled switches at Thornton Junction. This proposal will mitigate the blockage of grade crossings, one of the main concerns raised by protestants.
>
> "There are other environmental benefits to be gained from this proposal: the south Hammond classification [yard] would be eliminated and noise, traffic, and safety problems in that area would be removed. Also, the FEIS concluded that this proposal would result in a net reduction of air pollutants and energy consumption because L&N traffic would be moving over a shorter route.
>
> "The evidence of record shows that the environmental concerns and adverse conditions essentially are pre-existent. We conclude that the benefits both environmental and operational outweigh certain harmful environmental impacts;

[3]Pet. App., p. 28a.
[4]Pet. App., pp. 46a-51a.
[5]Pet. App., pp. 14a-17a.

> that the Administrative Law Judge committed reversible error by failing to reach this conclusion, and that the applications should be granted." (Pet. App., p. 16a).

The Commission went on to say that:

> "We have determined that the facts of this case do not warrant the imposition of the conditions recommended by the Administrative Law Judge. (Pet. App., p. 17a).

As was noted on pages 7 and 8 of the petition, the Commission stated that the conditions suggested by the ALJ related to matters subject to the regulation of other Federal, State, and local agencies and that those agencies rather than the Commission were the appropriate authorities to enforce compliance. Review of the eight suggested conditions on pages 53a and 54a of Petitioners' appendix reveals that only three of them relate to bona fide environmental matters.

Proposed condition No. 1 relates to fire hydrants and water mains, purely local matters with respect to which the ICC has no jurisdiction or expertise. Proposed conditions Nos. 2 and 3 cover grade crossing blockage and pedestrian overpasses, two areas which are also without the jurisdiction and expertise of the ICC. It is well settled that authority over public safety at rail-highway grade crossings is peculiarily within the police power of the states. Please refer to the 11 decisions of this Court which are cited for that proposition in *American Trucking Associations, Inc.* v. *United States,* 242 F. Supp. 597, 599 (D.C.D.C. 1965),

aff'd per curiam, 382 U.S. 373 (1966). Proposed conditions Nos. 4, 5, and 6 deal with noise-abatement measures and are the only ones which deal with matters which can logically be characterized as "environmental." The Commission was aware that such environmental matters at the involved railroad yard had been the subjects of a suit filed by the State of Illinois (one of the Petitioners herein) in the Circuit Court of Cook County, Illinois, and that such noise-abatement measures had been addressed in a "Settlement Agreement" which resulted in the dismissal of that action. (Pet. App., p. 13a n.3). Proposed conditions Nos. 7 and 8 relate more to public relations than to environmental concerns, and the Commission again has no jurisdiction or expertise with respect to railroad-community relations.

It is thus apparent that the Commission did not ignore its obligations under NEPA. It exhaustively considered the environmental issues which had been raised, and in an appropriate exercise of its discretion, concluded that the evidence of record did not support the imposition of conditions such as those suggested by its ALJ. Petitioners may question the wisdom of the Commission's exercise of its discretion to reject the ALJ's suggested conditions and claim that said exercise of discretion constituted error, but such matters are not among those which call for issuance of a writ of certiorari by this Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRED R. BIRKHOLZ
P. O. Box 32290
Louisville, Kentucky 40232
Tel. (502) 587-5454

EMRIED D. COLE
500 Water Street
Jacksonville, Florida 32202
Tel. (904) 359-1244

R. LYLE KEY, JR.
P. O. Box 32290
Louisville, Kentucky 40232
Tel. (502) 587-5739

Counsel for Respondent Louisville and Nashville Railroad Company

Date: August, 1980